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Supreme Court of the United States

PHILIP MORRIS U.S.A.,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF *AMICI CURIAE* AARP, SOUTHERN POVERTY LAW CENTER, CONSUMER FEDERATION OF AMERICA, LAWRENCE E. MITCHELL, KELLYE Y. TESTY, DAVID MILLON, ERIC W. ORTS, KENT GREENFIELD, AND MICHAEL H. CROSBY IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

AARP is a 37 million member non-profit, non-partisan organization dedicated to addressing the needs and interests of people aged 50 and older. AARP focuses on ensuring access to affordable, quality health care; protecting the well-being of nursing homes and long-term care facility residents; enforcing federal and state regulations that shield older workers and persons with disabilities from discrimination; protecting consumers from deceptive financial practices; and ensuring adequate housing. AARP advocates for economic justice for victims of abuse, discrimination, financial fraud and predation, and other harmful practices, through damage awards made free from age bias.

The Southern Poverty Law Center of Montgomery, Alabama, has litigated numerous civil rights cases throughout the United States, including several landmark cases before this Court. Since 1979, the Center has succeeded in reducing the socially destructive activities of some of the nation's largest white supremacist organizations by helping victims of racist violence recover monetary damages and impose substantial punitive damages.

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[1] In accordance with Supreme Court Rule 37.6, amici state that: (1) no counsel to a party authored this brief, in whole or in part; and (2) no person or entity, other than amici, their members and their counsel have made a monetary contribution to the preparation or submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

The Consumer Federation of America (CFA) is a non-profit association organized in 1967 to advance the interests of consumers through advocacy, research and education. CFA's current membership is comprised of 300 national, state and local consumer groups throughout the county, which represent over 50 million consumers. Among other issues, CFA advocates for the rights of those harmed in the marketplace by fraud, negligence, predation, and deception. CFA supports the preservation of all currently available avenues for legitimate legal claims against the tobacco industry, including the opportunity to impose substantial damages that will adequately deter corporate misconduct.

Lawrence E. Mitchell is Theodore Rinehart Professor of Business Law at the George Washington University Law School, where he teaches corporation law, and directs the Sloan Program for the Study of Business in Society and its International Institute for Corporate Governance and Accountability. He wrote *Corporate Irresponsibility: America's Newest Export* (Yale Univ. Press 2002), and *Stacked Deck: A Story of Selfishness in America* (Temple Univ. Press 1998), both of which the publishers submitted for Pulitzer Prizes. He edits *Progressive Corporate Law* (1995), and co-authored the casebook, *Corporate Finance and Governance* with Lawrence Cunningham and Jeffrey Haas. He holds a B.A. from Williams College and a J.D. from Columbia University. **Kellye Y. Testy** is Dean and Professor of Law at Seattle University Law School, where she teaches business entities, contracts, corporate governance and economic justice. She directs the law school's Center for Corporations, Law and Society, and authored *Linking Progressive Corporate*

Law with Progressive Social Movements to Corporate Governance, 76 Tul. L. Rev. 1227 (2002), and *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 Ga. L. Rev. 1025 (2000). She holds a B.A. and J.D. from Indiana University. **David Millon** is J.D. Stombock Professor of Law at the Washington and Lee University Law School, where he teaches contracts, corporate law and legal history. He is former director of the Frances Lewis Law Center for law reform research. His publications include *Recalling Why Corporate Officers are Fiduciaries*, 46 Wm. & Mary L. Rev. 1597 (2005) (with Lyman Johnson), and *Objectivity and Democracy*, 67 N.Y.U. L. Rev. 1 (1992). He holds a B.A. and M.A. from the Ohio State University, an M.A. and Ph.D. from Cornell University, and a J.D. from Harvard University. **Eric W. Orts** is Guardsmark Professor of Legal Studies and Business Ethics and Professor of Management at the Wharton School of Business, where he teaches corporate and securities law, corporate governance, and environmental law and policy. He directs the Wharton School's Environmental Management Program. He authored *The Ethical and Environmental Limits of Stakeholder Theory*, 12 Bus. Ethics Q. 215 (2002) (with Alan Strudler); *Conflict of Interest on Corporate Boards*, in *Conflict of Interest in the Professions* (Oxford Univ. Press 2001); and *The Complexity and Legitimacy of Corporate Law*, 50 Wash. & Lee L. Rev. 1565 (1993), among other works. He holds a B.A. from Oberlin College, an M.A. from the New School for Social Research, a J.D. from the University of Michigan, and a J.S.D. from Columbia University. **Kent Greenfield** is Professor of Law and Thomas Carney Scholar at Boston College Law School, where he teaches corporate,

administrative and constitutional law. His publications include *Fundamental Flaws, Progressive Possibilities: A New View of Corporate Law* (Univ. of Chicago Press, forthcoming), and *A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the* Ultra Vires *Doctrine as Methods for Controlling Corporate Behavior*, 79 St. John's L. Rev. 929 (2005) (with Adam Sulkowski). He holds an A.B. from Brown University and a J.D. from the University of Chicago.

Each of the foregoing individual *amici* conducts research and teaching in corporate law and governance. The subject matter of this appeal directly concerns the professional work of each of them. These *amici* recognize that the law relies heavily on market mechanisms to ensure that corporate directors and officers act in the best interests of their companies, shareholders, and society, and submit that large punitive damages are necessary market incentives for efficient operation of our economy.

Michael H. Crosby, O.F.M. Cap., is coordinator of the Tobacco Issue Group of the Interfaith Center on Corporate Responsibility. He is an ordained Capuchin Franciscan, writes and speaks internationally on social justice, and wrote *Catholic Church Investments for Corporate Social Responsibility*, among other works. For many years he has sponsored shareholder resolutions and other corporate reform efforts at Philip Morris USA and other tobacco companies. He holds an M.A. in economics and a Ph.D. in theology. Fr. Crosby has learned from experience that substantial punitive

damages are necessary to create market pressure on corporate behavior that is otherwise beyond the capacity of shareholders to influence.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner's challenge to the Oregon Supreme Court's decision is a thinly-veiled attack on this Court's own reprehensibility-centered jurisprudence and mischaracterizes profoundly the Oregon high court's faithful adherence to this Court's guidance. Nothing in the *Williams* decision purports to "override" the constitutional requirement that punitive damages be reasonably related to the Plaintiff's harm. Rather, the Oregon court rightly strove to reconcile evidence of death-causing conduct at the highest degree of reprehensibility with the ratio guidelines this Court fashioned in cases where lesser reprehensibility causes economic loss and temporary emotional distress.[2]

In so doing, *Williams* honored reprehensibility as the "most important indicium" of reasonable punitive damages, citing *Gore*, 517 U.S. at 575, and reached the unremarkable conclusion that "single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may

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[2] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

arise from a double-digit ratio." *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1181 (Or. 2006).

Petitioner asks this Court to depart from its abiding principle and to embrace the notions "consistently rejected" in *Gore* and *State Farm*, "that the constitutional line is marked by a simple mathematical formula." 538 U.S. at 425; 517 U.S. at 582. Petitioner urges this Court to override the primacy of reprehensibility in favor of an arbitrary limit: a "low-single-digit" ratio (Pet. Brief, 33) that falls short of reflecting the full dimensions of Respondent's actual harm, and fails to punish or deter Petitioner's conduct.

The implications of Petitioner's ratio reduction is especially ominous for those who suffer significant harm that generates low compensatory damages: retirees not entitled to replace lost wages or recover back pay, the aged or impecunious who suffer injury or death from wrongful conduct, and victims of racial violence and intimidation. Compensatory damages calculations undervalue these lost lives and rights. Petitioner's "low-single-digit" limit would only compound this discrepancy by tying a miniscule multiplier to a compensatory numerator that itself does not fully reflect inflicted harm. This conflation will have unconscionable results: defendants will be less severely punished when those they harm are older or poorer. *Amici* thus urge this Court's adherence to its principle that a higher ratio of punitive to compensatory damages is proper when the latter are low, or difficult to measure, despite great harm. The States' interests in protecting their most vulnerable citizens from physical, financial, and emotional abuse will be thwarted if punitive

damages are rendered incapable of attaining the profit-effecting levels necessary to trigger market opprobrium and corporate behavior modification.

ARGUMENT

I. EXALTING RATIO OVER REPREHENSIBILITY UNDERDETERS EGREGIOUS MISCONDUCT

As set forth in *State Farm*, 538 U.S. at 425, "there are no rigid benchmarks that a punitive damages award may not surpass." Thus, "the judicial function is to police a range, not a point."[3] Petitioner seeks to compress this range to a vanishing point that neither punishes nor deters extremely reprehensible conduct. If, as the course of *State Farm* itself shows, a 9-to-1 ratio is constitutionally acceptable to punish and deter a single act of hardball claims adjustment that caused neither death nor permanent injury,[4] the intentional

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[3] *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003).

[4] Indeed, the ratio analysis set forth by this Court in *State Farm* enabled the Utah Supreme Court, on remand, to faithfully apply it to the record of State Farm's conduct in the *Campbell* case itself, and to find a 9-to-1 ratio fully appropriate, on its own assessment of State Farm's plaintiff-specific reprehensibility, harm State Farm's conduct caused the Campbells. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004). This Court denied further review. Reasonable judicial minds may permissibly differ, within the boundaries of constitutional due process, in assessing the reprehensibility of specific conduct that caused no wrongful death or permanent personal injury within a range of from 1-to-1 (this Court's estimation) to 9-to-1 (the Utah Supreme Court's final

conduct of Philip Morris in Oregon, which "put a significant number of victims at profound risk for an extended period of time" and was "extraordinarily reprehensible, by any measure" must warrant a substantially higher level of punishment.[5] If all reprehensible conduct of any degree, duration, or consequence can be compressed within a 9:1 range, much less the 4:1 and lower points that Petitioner urges, then the punitive damages formula no longer guarantees due process, to either Plaintiff or Defendant, but only perpetuates *underdeterrence*.

Petitioner and its *amici* have seized upon the worst possible case in which to urge punitive damages nullification. This is a wrongful death case. This Court has never considered such devastating, irrevocable personal harm in reviewing punitive damages. Key *Gore/State Farm* reprehensibility factors involve "physical as opposed to economic harm" and "indifference to or a reckless disregard of the health or safety of others," but were absent from defendants' conduct in those cases.[6] Here, the cigarettes that killed Jesse Williams are no ordinary product, and his death from lung cancer is no isolated incident. This Court has recognized the uniquely devastating public health consequences of the tobacco industry's decision to make and market cigarettes.[7] The intentionality of this conduct has

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calculation). Logically, and as suggested in *State Farm*, punitive damages for more egregious conduct causing more severe and long-lasting harm can properly far exceed this range.

[5] *Williams v. Philip Morris, Inc.*, 127 P.3d 1165, 1182.

[6] *Gore*, 517 U.S. at 576-77; *State Farm*, 538 U.S. at 419.

[7] The FDA has "found that tobacco consumption was 'the

also been exposed in Justice Breyer's *Brown & Williamson* dissent:

> According to the FDA, only 2.5% of smokers successfully stop smoking each year, even though 70% say they want to quit and 34% actually make an attempt to do so. The fact that only a handful of those who try to quit smoking actually succeed illustrates ... the reality that the nicotine in cigarettes creates a powerful physiological addiction .... The FDA has found that the makers of cigarettes 'intend' these physical effects. *Id.* at 191.[8]

Neither this specific and uniquely reprehensible conduct, nor anything like it, has been before this Court's purview in the context of the review of a punitive damages award. The pleas of Petitioner and its *amici* for an arbitrary regime that would cabin punitive damages within a 4:1, 3:1 or 1:1 range, and the irony of their selection of "a massive, continuous, near-half-century scheme to defraud"[9] as their putative poster child for reform,

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single leading cause of preventable death in the United States ...[m]ore than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses...." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

[8] The dissent additionally cites Petitioner's affirmative unfounded health claims for its products: "recognized laboratory tests have conclusively proven the advantage of Philip Morris." *Id.* at 172.

[9] *See United States v. Philip Morris*, ___ F. Supp. 2d ___, 2006 U.S. Dist. LEXIS 61412 (D.D.C. Aug. 17, 2006)

exposes an agenda to remove reprehensibility from *any* role in punitive damages assessment, thereby nullifying the States' interests in deterrence and retribution in those circumstances that will most require such moral force.[10]

II. PETITIONER'S REQUESTED "LOW-SINGLE-DIGIT" LIMIT TIES THE PUNISHMENT TO THE VICTIM, NOT THE CRIME

Petitioner would deconstruct this Court's punitive damages system by de-coupling punitive damages from the conduct of the tortfeasor, thereby dismantling the reprehensibility-punitive damages connection, and instead linking the damages only to the economic value of the victim's loss. This Court has stated that "[t]he wealth of a defendant cannot serve to justify an otherwise unconstitutional punitive damages award."[11] Surely the corollary principle must likewise be upheld: a punitive damages award cannot be limited by the economic value of the victim, particularly when the Defendant has far greater economic wealth and power. But this is precisely what Petitioner proposes: a system in which the punitive damages sanction *least* protects from fraud or exploitation those with the *most* "financial vulnerability."[12]

(Kessler, J.) (civil RICO judgment describing 50+ year deceptive scheme).

[10] *Gore*, 517 U.S. at 568.

[11] *State Farm*, 538 U.S. at 427.

[12] *State Farm*, 538 U.S. 419; *Gore*, 575 U.S. at 576-577.

Wrongful death damages undervalue older Americans, like Jesse Williams, who died at age 67. They focus on lost wages and future earning capacity, not on the contributions that older Americans have made to our society and economy during their lifetimes.[13] It is recognized among scholars of all stripes, including Petitioner's *amici*, that "[w]rongful death damages fail to compensate for the harm to decedent"[14] and result "in a systematic underestimation of damages in wrongful-death cases."[15]

That the severity, duration, and societally transgressive nature of the harm caused by a defendant's conduct is not fully reflected in compensatory damages is exposed by comparison of the compensatory damages in *State Farm*, $1 million for 1.5 years of emotional distress, with the $521,485 (Oregon statutory maximum) of wrongful death damages in *Williams*. 127 P.3d at 1171. No one would argue that these two harms are equivalent in degree, or even in kind, or that they call for punitive damages of equivalent magnitude. Indeed, as *Gore* notes "permanent" harms justify the highest verdicts. 517 U.S. at 576 n.24.

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[13] *See* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations In Environmental and Safety Torts*, 87 Geo. L.J. 285, 314 (1998).

[14] A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 941-42 (1998).

[15] William Lanes & Richard Posner, *The Economic Structure of Tort Law 187* (1987).

A regime that calculates punitive damages primarily in relation to this diminishing value, rather than to the reprehensibility of the conduct that caused harm, serves as an ineffective deterrent to conduct that targets and victimizes the powerless, and in fact may perversely incentivize such misconduct.[16] Aside from this unintended social consequence, it profoundly misapprehends the established principles of punitive damages jurisprudence.

The first reported decision to articulate the principles of punitive damages illustrates the point. *Huckle v. Money*, 2 Wils. KB 205; 95 Eng. Rep. 768 (1763), arose from the royal campaign to suppress John Wilkes' controversial journal, "The North Briton." A general warrant naming no specific person was issued; Huckle, a hapless printer's assistant, was taken into custody by Royal agents. His confinement was humane: during his 6 hours imprisonment, his captors entertained him "by treating him with beef-steaks and beer."[17] Once

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[16] Ratio compression would eviscerate the effectiveness of punitive damages in cases that need them most, such as murder and mayhem by hate groups. *See, e.g., Macedonia v. Christian Knights of the KKK*, No. 96-14-217 (Charleston Co., S.C.) (1998) (church burning) (punitive award $21.5 million; ratio 71.67:1); *McKinney v. Southern Knights of the KKK*, No. 1:87-565-CAM (N.D. Ga. 1988) (punitive award $831,578.93; ratio 332.62:1) (attack on civil rights march); *Berhanu v. Metzger and White Aryan Resistance*, 850 P.2d 373 (Ore. App. 1993); *cert denied*, 511 U.S. 1106 (1994) (racial murder) (punitive award $10 million; ratio 10.25:1). *See* www.splcenter.org/legal/docket/files for additional cases.

[17] 95 Eng. Rep. at 768.

freed, Mr. Huckle sued for trespass and imprisonment. The jury assessed his damages at 300 £, nearly 300 times his weekly wage. On appeal, defendant admitted liability but claimed that the damages were "most outrageous" given the lack of bodily injury, the brevity of confinement, plaintiff's modest lost income, and the civility with which he was treated.

In a passage frequently cited by this Court (and Oregon's Supreme Court),[18] Lord Camden established the abiding principles of our punitive damages law, and the reasoning by which a higher ratio award (exceeding 2,000 times the value of plaintiff's lost wages) was proper.

> The personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 £ damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the

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[18] *See, e.g., Beckwith v. Bean*, 98 U.S. 266 (1879); *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101 (1893); *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927); *Munro v. Pape*, 365 U.S. 167 (1961); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Wayne County v. Wood*, 691 P.2d 473 (Or. 1984); *State v. McMurphy*, 635 P.2d 372 (Or. 1981); and *Van Lom v. Schneiderman*, 210 P.2d 461 (Or. 1949).

> subject appeared to them at the trial.... These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Setting, as Petitioner requests, the constitutional maximum at or near the amount of compensatory damages trivializes all harms inflicted on those of inconsiderable rank in life, rather than punishing or deterring the egregiousness of the conduct that caused the harm.

In *Matthias v. Accor Economy Lodging*,[19] Plaintiffs Burl and Desiree Mathias were bitten by bedbugs at a Chicago Motel 6. Management had refused to fumigate the motel; instead, in a charade of "farcical proportions," defendants fumigated on a room-by-room basis (one step behind the bedbugs) and lied to guests.[20] The Court affirmed punitive damages of $186,000 to each plaintiff, a 37.2-to-1 ratio, recognizing that the conduct, which was certainly foreseeably offensive, had a limited compensatory price tag attached, and hence would

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[19] 347 F.3d 672 (7th Cir. 2003).

[20] *Id.* at 674-75; *Gore*, 517 U.S. at 576, n.24: "The principle that punishment should fit the crime is deeply rooted and frequently repeated in common-law jurisprudence."

go unprosecuted, unpunished and deterred, but for the prospect of high ratio punitive damages.

Accor summarizes this Court's punitive damages jurisprudence, as it culminated in *Gore* and *State Farm*, invoking *Gore*'s first principle that "punitive damages should be proportional to the wrongfulness of the defendant's actions." 347 F.3d at 672. This rule squares with "the core of the Aristotelian notion of corrective justice ...that sanctions should be based on the wrong done rather than on the status of the defendant; a person is punished for what he does, not who he is, even if the who is a large corporation." *Id.*

Petitioner's strategy of escape from this core corrective justice principle is to shift the "fit" of the punishment from the egregiousness of the conduct to the residual actuarial value of its victim. But "[t]hat would be discriminatory and would violate the rule of law, as we explained earlier, by making punishment depend on status rather than conduct." *Accor*, 347 F.3d at 677.

The courts in *Huckle* and *Accor* recognized that the punishment for reprehensible conduct should not be scaled down to the economic worth of the lost money, or time, of the victim, but set at the level necessary for punishment and correction. Mr. Williams' lost life had small residual value: less than $1 million, expressed as compensatory damages. The inexorable economics of tort rendered his lost life far less valuable than that of a rising young executive; and the purposeful and profitable wrongful conduct that induced his smoking and took his life far more affordable, than the death of a CEO by "mere accident." Without the balancing afforded

by ratio guidelines and flexible as the capacity for reprehensible conduct, Americans become increasingly vulnerable to wrongdoing.

III. COMPENSATORY DAMAGES ARE AN INSUFFICIENT PROXY FOR HARM IN PERSONAL INJURY AND DEATH CASES

If punitive damages are not measured against the reprehensibility of the conduct, and the totality of its resulting harm to the Plaintiff's interests in liberty, health, and life, then minimal, let alone optimal, deterrence will never be achieved. This Court wisely keyed the ratio to the "actual or potential harm suffered by the plaintiff,"[21] not merely to the sum awarded as compensatory damages. The distinction has vast significance in effecting deterrence within due process bounds. Tying punitive damages primarily to the compensatory damages award in cases not limited to economic loss exploits the gap between compensatory damages and harm, to the advantage of the wrongdoer. As this Court emphasized in the first sentence of its *State Farm* decision, punitive damages are the measure of punishment that a state imposes upon a defendant in a civil case. 538 U.S. at 412. The plaintiff is a state agent in such a case, serving to protect and promote societal interests in punishment and deterrence. Restricting the range of punitive damages to the economic value of that plaintiff's loss, when his life or health has also been forfeited, will predictably frustrate the legitimate purposes of punitive damages, rather than promote them in most cases, and will certainly fail to achieve the purposes of punitive damages in cases at the

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[21] *State Farm*, 538 U.S. at 418; *Gore*, 517 U.S. at 575.

high end of the reprehensibility scale – where they are most needed.

IV. REPREHENSIBILITY-BASED ASSESSMENT ENFORCES SOCIETAL/STATE INTERESTS WHERE INTERNAL CORPORATE GOVERNANCE HAS FAILED

Philip Morris' conduct caused Jesse Williams' death. Jesse Williams was a human being; Philip Morris is a limited liability corporation. The law of Oregon, as elsewhere, treats both as legal persons, and does not discriminate[22], despite the many "peculiar characteristics of corporations as distinguished from natural persons."[23]

The reality that, apart from legal fiction, human and corporate persons are different creates a profound challenge in applying punitive damages to fulfill the express and legitimate deterrent and retributive functions this Court has acknowledged.[24] Human beings feel shame, fear, and pain. Sanctions involving death, imprisonment, or dishonor thus serve as powerful deterrents. Corporations may not be killed and themselves feel no inhibitory emotions. Human beings are held personally accountable for their crimes and torts. In contrast, corporate responsibility is merely economic, and is dispersed among thousands or millions of shareholders, none

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[22] *Behnke-Walker Business College v. Multnomah County*, 146 P.2d 614, 617-18 (Or. 1944).

[23] *Nelsen v. Davidson Industries, Inc.*, 360 P.3d 307, 310 (Or. 1989).

[24] *State Farm*, 538 U.S. at 417.

of whom is at risk in excess of her investment.[25] If punitive damages are to effectively punish and deter corporate misconduct, they must be imposed at a level sufficient to modify the behavior of the corporation's officers, directors and shareholders.

Optimal deterrence is achieved by confronting defendants with damages equal to the aggregate tortious loss, or by requiring disgorgement of all profits from reprehensible conduct. The *Williams* award itself, either alone or in combination with those handful of other smokers have obtained, does not present such a confrontation; the *Williams* award itself reflects only a week or two of Petitioner's yearly profits. Petitioner's reprehensible conduct, in Oregon and elsewhere, remains economically profitable. No unconstitutional level of punitive damages has been reached with *Williams*. Large awards are necessary to overcome the strategy of attrition that may otherwise be deployed to elude accountability. *Accor* describes the attrition problem, in which a defendant exploits litigation cost and delay to deter prosecution as follows:

> Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this ... to make litigating against it very costly ... In other words, the defendant is investing

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[25] *See U.S. v. Philip Morris*, 2006 U.S. Dist. LEXIS 61412 at * 19 (finding, *inter alia*, that Petitioner deceptively marketed "lethal products" with "single-minded focus on financial success" "without regard for the human tragedy or social costs that success exacted.")

> in developing a reputation intended to deter plaintiffs. It is difficult otherwise to explain the great stubbornness with which it has defended this case ....[26]

A strategy of attrition is also at work in tobacco litigation. In its *Cippollone* decision, this Court rejected the tobacco industry's plea for preemption, and enabled smokers' tort claims to continue against tobacco companies, recognizing that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.[27] But not potent enough. The *Cippollone* litigation was protracted. Defendant deposed one of plaintiffs' experts, a doctor, for 22 days. While the verdict for plaintiff in *Cippollone* was $400,000, plaintiffs incurred over $500,000 in out-of-pocket costs and over $2 million in lawyer and paralegal time to accomplish this result, while an estimated $50 million was spent in defense. *See* Andrew Blume, "*Will Next Round of Smoking Challenges be Worth Pursuing?*," the National Law Journal, June 21, 1988. Tobacco company attorneys were quoted in the press as stating, "This verdict sends a message to all plaintiffs' attorneys that these cases are not worth pursuing." *Id.* As counsel for one of Petitioner's *amici* put it then:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive

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[26] 347 F.3d at 677.

[27] *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992).

> for plaintiffs' lawyers . . . To paraphrase General Patton, the way we won these cases was not by spending all of [our] money, but by making that other son of a bitch spend all of his.[28]

Until 2001, despite over 40 years of litigation, no tobacco company had paid a nickel to settle a smokers' case, or satisfy a smokers' judgment.[29] The strategy of attrition was absolute. The lesson has been well learned by would-be plaintiffs, and their lawyers. While the tobacco tragedy is certainly, in the words of a California Court of Appeal, "the quintessential mass tort,"[30] there is no quintessential mass tort litigation. The 1999 *Williams* verdict did not precipitate a wave of smokers' suits in Oregon. Past and pending tobacco suits number in the high hundreds or low thousands, not the hundreds of thousands or millions that public health statistics would predict. The tobacco companies' misconduct is open, obvious, and

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[28] *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (citing April 29, 1988 memo from J. Michael Jordan, counsel for RJ Reynolds Tobacco Co.).

[29] The first payout, $1 million, came in March 2001, to 70 year old Grady Carter. His years-long battle culminated in this Court's denial of certiorari. *Brown & Williamson Tobacco Corp. v. Carter*, 533 U.S. 950 (2001).

[30] *Henley v. Philip Morris, Inc.*, 114 Cal. App. 4th 1429, 1478 (Cal. App. 2004), *cert. denied*, 544 U.S. 920 (2005) ("Plaintiff's claims ...rest on a quintessential 'mass tort,' i.e., a course of more-or-less uniform conduct directed at the entire public and maliciously injuring ...an entire category of persons to which plaintiff squarely belongs.").

notorious – scarcely hidden at this point – but nonetheless "undetected."

Higher than single-digit ratios are needed to counteract such a strategy. As Judge Posner recently reiterated: "a higher multiple is permissible when the expected amount of compensatory damages . . . would be unlikely to induce a suit even of compelling merit, especially if there are multiple victims and an indication that the tortfeasor has been eluding liability successfully." Reprehensibility provides a negative incentive by rendering transgressive conduct unprofitable: "the more egregious, the higher the permissible ratio." Applying a high ratio to highly reprehensible conduct provides a complementary positive incentive to plaintiffs to overcome attrition: "[t]he proper focus of analysis of the ratio itself is the adequacy of the combined award of compensatory and punitive damages to motivate the prosecution of a meritorious claim."[31]

Petitioner and its *amici* express concern that the *Williams* award will be replicated in future Oregon suits, inflicting multiple punishment for the same harm. The Oregon statute protects against this outcome.[32] Moreover, Petitioner has resisted

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[31] *Gavin v. AT&T Corp.*, ___ F.3d ____, 2006 U.S. App. LEXIS 22644, **16-18 (7th Cir. 2006).

[32] Oregon law prevents replication of the *Williams* verdict. Philip Morris will not be punished again for its conduct toward Jesse Williams, and will be punished less, next time, for its conduct toward another Oregon smoker. Oregon law provides for consideration of past punitive damage awards. Or. Rev. Stat. § 30.925(2)(g).

the legitimate procedural solution (suggested in *State Farm)* "inclusion" of all similarly injured persons before one court for binding determination of all punitive damages toward the group. 538 U.S. at 421-22.[33]

The modern limited liability corporation, a distinctly American invention, has been extant since the mid 19th century.[34] The birth and legal recognition of the corporate form occurred in an era

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[33] Petitioner has consistently opposed and appealed every effort to bring a statewide or nationwide class action against any aspect of tobacco industry conduct. *Brief*, fn. 6. Classwide punitive damage calculations would nonetheless provide conformity and predictability within each similarly-situated group, while ensuring against overdeterrence and preventing multiple punishment. *See, e.g., Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474 (5th Cir. 1986), affirming classwide determination of punitive damages of "reasonable proportionality" for all asbestos injury claimants on file in the Eastern District of Texas who proved "actual damages." *State Farm* does not foreclose using voluntary Rule 23(b)(3)/Rule 23(c)(4)(A) common issue mechanisms to join all who claim compensatory and punitive damages from the same defendant for the same conduct.

[34] *See, e.g.*, E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 Harv. L. Rev. 1351 (1948); M. Wormser, *Disregard Of The Corporate Fiction And Allied Corporation Problems 14* (New York: Banter, Voorhis & Co. 1927) ("The policy of our law today sanctions incorporation with the consequent immunity from individual liability. It follows that no fraud is committed in incorporating for the precise purpose of avoiding and escaping personal responsibility. Indeed, that is exactly why most people incorporate . . .").

of local transactions. There was no national communications or transportation network, and the nationwide mass marketing of standardized products was unknown. Corporations were – and still are – creatures of state law, but the 20th and 21st centuries have seen them transcend these boundaries, to conduct their business on a national and international plane.[35] Yet corporations are still creatures of state charter, and the states retain the primary role of enforcing good corporate conduct. It is thus fully appropriate that, as the states decide, on a state-by-state basis, whether to recognize punitive damages, and on how to allocate them, corporations such as Petitioner are on due notice of this variation, and are fully able to make decisions about their marketing and manufacturing conduct with due regard for compliance with these laws. Moreover, should the imposition of a "foreign" state's law be arbitrary or fundamentally unfair in a given case, Petitioner can argue for the application of its home state's law to the dispute.[36]

While the corporate form combines the aggregation of capital with the diffusion of liability among many shareholders, corporations themselves nonetheless remain accountable as legal persons, under the terms and conditions of the social contract

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[35] As Petitioner's website homepage, "PM USA At-A-Glance," states: "Philip Morris USA is the nation's leading cigarette manufacturer and for more than 20 consecutive years has had the highest revenues, income, volume and market share among U.S. tobacco companies." http://www.philipmorrisusa.com.

[36] *See Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003).

that binds each to the other in our system. Conduct that violates that contract implicates, under most states' laws, the imposition of punitive damages sufficient to punish and deter. History and recent events demonstrate that internal corporate governance cannot be relied upon to prevent either conduct that transgresses societal norms or conduct by corporate insiders that harms the interest of the corporation itself, as the Enron and options backdating scandals illustrate. Our system leaves the responsibility of policing corporations and enforcing corporate good conduct almost entirely to the states. For most of them, punitive damages are the established ultimate enforcement mechanism of choice.[37] Disabling this mechanism through arbitrary ratio limits that operate as maximum fines regardless of the level of harm or reprehensibility places those corporations whose activities affect the lives of the largest number largely outside the effective reach of civil law.

In providing a flexible ratio format informed primarily by reprehensibility, this Court went as far

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[37] The states' wide variety of punitive damage systems include "split recovery" statutes, by which some portion of punitive awards (*e.g.*, 60% in Oregon, 75% in Indiana) are deposited into state general (or special victims') funds. At least 16 states have punitive damages "caps," enacted as tort reforms to control insurance and business liability costs. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 372-86 (2003). Such legislative responses already accommodate Petitioner's concerns. The arbitrary limit Petitioner seeks, in essence a federal punitive damages cap, contradicts the rule that honors each state's "policy choice" on how (and how much) to punish misconduct within its borders. 517 U.S. at 571.

as it should go (and farther than several of its members thought proper) in superimposing Constitutional restraints on state statutory and common law.[38] The campaign of Petitioner and its *amici* to collapse this ratio system to an arbitrary limit disables punitive damages from regulating conduct that does societal damage.

In *Cooper*, this Court mandated appellate judicial *de novo* review, on the request of any party, of every punitive damages jury award.[39] This directive has, in the past five years, occasioned a massive investment of judicial resources in the careful review of punitive damages awards of all kinds.[40] Reversion to an arbitrary limit revokes the trust that this Court has reposed in the institution of our appellate courts, renders their ongoing efforts to apply *Gore/Cooper/State Farm* an exercise in futility, and abandons the animating truth behind primary reliance on the reprehensibility factor to generate a just and effective punitive damages award: that misconduct will continue to display an unpredictable range of reprehensibility.

Petitioner's proffered solution promotes predictability of outcome (regardless of the degree of reprehensibility) at the expense of both proportional

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[38] *See, e.g.*, *Gore*, 517 U.S. at 599 (Scalia, J., joined by Thomas, J. dissenting); *State Farm*, 538 U.S. at 429 (Scalia, Thomas and Ginsburg, JJ., dissenting).

[39] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439-40 (2001).

[40] A quick review of the LEXIS database, for example, yields over 500 federal and nearly 600 state decisions that have cited *State Farm* and/or *Cooper*.

punishment and effective deterrence. Limiting punishment to a preset ratio does not similarly limit reprehensibility itself. It simply gives a free pass to the most reprehensible conduct. This Court has seen, and will continue to see, an increasing number of *certiorari* petitions raising punitive damages questions. It may best minimize this future flow by reaffirming the flexibility of its ratio analysis and the primary importance of the reprehensibility indicium in all punitive damages calculations.

V. SUBSTANTIAL PUNITIVE DAMAGES ENABLE CAPITAL MARKETS TO DETER CORPORATE MISCONDUCT

Two principal features of corporate governance make substantial punitive damages against a corporate entity the only effective deterrent to corporate misconduct of the type which leads to death, injury, and abuse of human rights. First is a collectivity principle: the board of a publicly held corporation can act only as a board. Individual directors have no power to bind the corporation. All decisions of the board are made as a group and publicly reported as having been made by a group. In almost all cases of board misbehavior, the board can only be held liable as a group. This aspect of American corporate governance creates a dispersion of accountability and responsibility in which no single director can be held individually to account. [41]

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[41] *See, e.g.*, Elizabeth Wolgast, *The Ethics of an Artificial Person* (1992) (examining moral alienation of institutional decisionmaker from decision); Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest*

Second is an insulation principle: the structure of corporate board and managerial decisionmaking insulates the corporation's directors and officers from suffering personally from their decisions, or being confronted with the resulting personal suffering to others. No officer or director of Philip Morris USA, after participating in the decisions that led to Jesse Williams' death, ever met him, sat at his bedside, attended his funeral, or faced his family. Mr. Williams' death cannot be attributed to any single Philip Morris officer or director in a manner that would precipitate remorse or shame.

In short, the decisionmaking structure in American corporate law shields directors and officers from any of the human incentives that would lead them to apply personal standards of human decency or morality in their decisionmaking. The only way to ensure that corporate boards and executive officers have incentives to incorporate standards of decency and responsibility into their decisionmaking is through the market.

Any substantial operating loss or other adverse impact on corporate profitability will exert pressure on the share price of a public corporation's stock, and in turn on the corporation's officers and directors. Financial analysis suggests, for example, that CEOs are removed when a corporation's financial performance does not meet the expectations of its own board—especially the independent directors—or of financial analysts in

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Export (Yale Univ. Press 2002) (evaluating irresponsible corporate behavior from perspective of structural and personal detachment of board).

the broader marketplace.[42] Poor stock performance puts boards and managers under significant pressure from stockholders.[43] Large declines in a corporation's earnings put it at significant risk of shareholder litigation.[44] Moreover, a corporation's stock price performance tends to be the largest component of CEO compensation, which creates significant disincentives for CEOs to engage in corporate behavior that could adversely affect the corporation's stock price.[45] The importance to CEOs of maintaining share price is emphasized by recent findings, such as the stock options backdating

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[42] Michael S. Weisbach, *Outside Directors and CEO Turnover*, 20 J. Fin. Econ. 431 (1988); Sheila M. Puffer and Joseph B. Weintrop, *Corporate Performance and CEO Turnover: The Role of Performance Expectations*, 36 Admin. Sci. Q. 1 (1991).

[43] *See, e.g.*, Joe Lauria, *Mark Hurd Turns Around HP Fortunes*, Knight-Ridder Tribune Business News, May 21, 2006 (describing ouster of Hewlett-Packard CEO Carly Fiorina for poor corporate performance); Richard Phalon, *For Warnaco Execs It's Time to Sink or Swim*, Barron's, Aug. 28, 2006, at 20; Cassell Bryan-Low, *Vodafone Investors Stress Over Stagnant Stock*, Wall Street Journal, Feb. 8, 2006, at C-1.

[44] Jennifer Francis, *et al.*, *Shareholder Litigation and Corporate Disclosures*, 32 J. Accounting Rsch. 137 (1994).

[45] Susan J. Stabile, *Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?*, 2 U. Pa. J. Lab. & Emp. L. 227 (1999); John E. Core, *et al.*, *Are Performance Measures Other Than Price Important to CEO Incentives?*, Social Science Rsch. Ntwk./Wkg. Paper Ser. EFA 0418 (2000).

scandal, that suggest CEO compensation can create significant incentives to commit fraud. [46]

Litigation against a board of directors can result in significant corporate governance reforms that improve corporate performance. "[D]erivative lawsuits have a significant effect on the governance structure of defendant firms. . . . [Empirical findings] consistently suggest that derivative suits produce improvements in corporate governance."[47] However, shareholder litigation cannot ordinarily be expected to succeed, and threats of such litigation will tend to be empty, unless there is some substantial drop in the corporation's dollar value to its shareholders. In the absence of substantial adverse effects on corporate financial performance, courts have permitted shareholders to bring actions against their board of directors for breach of fiduciary duty when the board has caused the corporation to violate the law,[48] but the board's breach of its duty of good faith has not, traditionally, been independently actionable.[49]

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[46] Shane A. Johnson, *et al.*, *Managerial Incentives and Corporate Fraud: The Sources of Incentives Matter*, Social Science Rsch. Ntwk./Wkg. Paper Ser. EFA Zurich Meetings (2006).

[47] Stephen P. Ferris, et al., *Derivative Lawsuits as a Corporate Governance Mechanism: Empirical Evidence on Board Changes Surrounding Filings*, Working Paper No. 01-03, Contracting and Organizations Research Institute (2001).

[48] *See, e.g., Miller v. AT&T*, 507 F. 2d 759 (3d Cir. 1974).

[49] *See, e.g.*, Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 Del. J. Corp. L. 1 (2006).

Punitive damages for corporate malfeasance that are high enough to impact corporate financial performance exert the same effects on corporate behavior as other adverse impacts on that performance are known to do. In the absence of substantial punitive damages, the corporation's share price will likely remain unaffected by reprehensible behavior, and derivative litigation will be unlikely, removing any legal or financial incentive for the board to behave responsibly. Instead, the board will be rewarded, by longer tenure and by higher compensation, for socially transgressive behavior so long as it increases corporate profits and raises share prices. Substantial punitive damages may be the only effective way to ensure that corporations, and their decisionmakers, experience directly the market consequences of their conduct, and accordingly direct their enterprises toward reform.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

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